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No. 75-461

In the Supreme Court of the United States

OCTOBER TERM, 1975

LOIS H. MITCHELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
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Washington, D. C. 20530.

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Petitioner contends that the Court of Claims erroneously dismissed her petition for relief from a demotion from a GS-6 to a GS-4 tax examiner because the procedures by which she was demoted violated due process and Civil Service Commission regulations.

On May 6, 1971, petitioner Lois H. Mitchell, a GS-6 tax examiner with the Internal Revenue Service (IRS), received a warning notice of inefficiency from that agency, apprising her of the fact that her error rate in reviewing federal tax returns was above the maximum acceptable level and that her production rate was below the acceptable level. She was

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allowed thirty days to correct these deficiencies; the thirty-day period was thereafter extended due to petitioner's illness and her failure to bring her production and error rate up to acceptable standards.

On March 17, 1972, petitioner was informed by letter of a proposed adverse action, *i.e.*, demotion from GS–6, Step 9, to GS–4, Step 10. The letter stated that the demotion was based upon two charges: her failure to meet acceptable production requirements and an error rate in excess of acceptable quality requirements. Each charge was supported by three specifications (Pet. App. 20–21).

Petitioner made an oral reply to these charges on May 10, 1972, and on June 14, 1972, her counsel certified the accuracy of the transcript of this oral reply. Following consideration of the reply, IRS issued a decision on July 7, 1972, ordering petitioner's demotion.

Petitioner appealed the agency decision to the Atlanta Regional Office of the Civil Service Commission, where a hearing was held before an Appeals Examiner on November 2–3, 1972. The Examiner found that the agency had complied with all procedural requirements prescribed by Civil Service Commission regulations; that the charges lodged against the petitioner were supported by substantial evidence; and that the agency action was neither arbitrary or capricious (Pet. App. 9–19). This decision was affirmed by the Civil Service Commission's Board of Appeals and Review on June 27, 1973 (Pet. App. 4–8).

A petition was then filed with the United States Court of Claims which, on June 25, 1975, granted the

government's motion for summary judgment and dismissed petitioner's case. The court held that the adverse action against the petitioner was conducted in compliance with applicable statutes and regulations; that petitioner was not deprived of due process; and that the findings of the Civil Service Commission were supported by substantial evidence (Pet. App. 1–3).

The decision of the Court of Claims is correct. Further, this case raises issues which, because they turn on their particular facts, do not merit review by this Court.

1. Petitioner's primary contention is that she was not afforded an opportunity to review the actual tax returns (together with their identifying IBM "control cards") processed by her during the relevant period (*i.e.*, May 7, 1971, to November 5, 1971). As petitioner previously acknowledged and as the Court of Claims correctly found, the tax returns and control cards were not the basis of the administrative action (Pet. App. 2).[1] The demotion of petitioner was based upon her *rate* of error and *rate* of production, figures that were taken from daily work reports that set forth petitioner's work production, hours spent, rate of production, errors found, and error rate, and from weekly time reports and weekly computations of average case production (see Pet. App. 12–13). These doc-

[1] Petitioner's counsel stated (Admin. R., Part II, at 359): "We certainly agree that the control cards and the cases were not used as a basis for the proposed adverse action, and we didn't ask them for the information on that basis."

uments, numbering over 400 pages, were made available to petitioner (Pet. App. 12). Petitioner now claims, however, that the tax returns and control cards formed the basis of these daily and weekly summaries and that IRS's failure to produce this material for her review deprived her of due process by limiting her ability to respond (both in the oral reply before the agency and at the Civil Service Commission hearing) to the charges lodged against her.[2]

Petitioner's contention is without merit. The present procedure is reliable and fundamentally fair. See *Richardson* v. *Perales,* 402 U.S. 389, 402, 410. The essential records relied upon by IRS were the daily reports, which included the necessary information as to rate of production, errors, and rate of error. These reports were based on a daily analysis of petitioner's work; all of the cases she processed were counted and reviewed (Pet. App. 13). Petitioner herself had input in the preparation of the reports. All errors were discussed with petitioner before they were attributed to

[2] Petitioner contends that IRS's failure to produce the requested material also contravened 5 C.F.R. 752.202(a)(2), which provides in relevant part: "[T]he material on which the notice [of proposed adverse action] is based and which is relied on to support the reasons in that notice, including statements of witnesses, documents, and investigative reports or extracts therefrom, shall be assembled and made available to the employee for his review. The notice shall inform the employee where he may review this material." But as already noted, the returns and cards were not the basis of the notice of proposed adverse action, nor were they relied on to support the reasons in that notice. This argument fails, moreover, for the reasons elaborated below as to why the due process claim is without merit.

her (Pet. App. 16; see *id.* at 3). Petitioner had the opportunity to challenge any alleged error in her work product, and some disputes were resolved in her favor (Pet. App. 16–17). Thus, it was reasonable to rely on the accuracy of these daily and weekly reports.

Petitioner has given no reason to believe that the reports were materially flawed, nor has she shown how the returns and cards would have been helpful to her defense. She has argued that on certain dates her production was erroneously recorded (Pet. App. 13). But, as the Civil Service Commission found, even "the production claimed by [petitioner] would not bring her production rate up to the acceptable * * * requirement * * * " (Pet. App. 14). As to the claim that she made fewer errors than alleged, we reiterate that all errors were discussed with petitioner before they were charged to her. Moreover, petitioner could not prove her claim by reviewing the returns and cards, since all of petitioner's errors were corrected and the cases processed and stored without an indication that an error had been found. Finally, petitioner has argued that the reports do not reflect the fact that she was assigned cases which were more complex than average (see Pet. 10). It would seem impossible to verify a claim of comparative disadvantage merely by reviewing petitioner's own work. In any event, after an extensive hearing and review, the Civil Service Commission found that petitioner was assigned cases in the same manner as other employees, and that cases

were not selectively assigned to petitioner because of their level of difficulty (Pet. App. 15).

Furthermore, the cost of requiring the IRS to locate and retrieve the returns and cards would be substantial. Over 1,000 cases are involved; the "records have been stored and are not retrievable without considerable effort * * *" (Pet. App. 10). The burdens such a requirement would impose, combined with its nonutility, clearly outweigh petitioner's asserted belief that the returns and cards would be helpful in defending against her demotion. See *Arnett* v. *Kennedy,* 416 U.S. 134, 168 (concurring opinion of Mr. Justice Powell), 186 (opinion of Mr. Justice White concurring in part and dissenting in part).

2. Petitioner further contends that the agency's notice of proposed adverse action failed to provide her with sufficient specificity and detail concerning the charges to satisfy the requirements of 5 C.F.R. 752.202(a)(1).[3]

The notice, however, set forth the charges in detail and enumerated three specifications under each charge (Pet. App. 20–21). As the Court of Claims correctly found, petitioner's lengthy reply before the agency (which is contained in 60 pages of record and included a large number of documentary exhibits), indicates that she understood the charges sufficiently well to pre-

[3] 5 C.F.R. 752.202(a)(1) provides in relevant part: "[A]n employee against whom adverse action is sought is entitled to at least 30 full days' advance written notice stating any and all reasons, specifically and in detail, for the proposed action."

sent a full defense (Pet. App. 2). Accordingly, the charges set forth in the notice of proposed adverse action were sufficiently specific and detailed to meet the requirements of 5 C.F.R. 752.202(a)(1) and to afford petitioner a fair opportunity to oppose her removal. *Burkett* v. *United States,* 402 F. 2d 1002 (Ct. Cl.).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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